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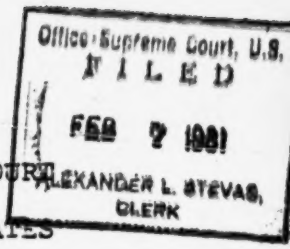

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1980

NO. _____

ALEX R. GROTE, JR., PETITIONER

VS.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

WARREN L. COLLINS, JR.
Kuhn & Collins
A Professional Corporation
507 West Tenth Street
Austin, Texas 78701
512/472-7241

COUNSEL OF RECORD
FOR PETITIONER

QUESTION PRESENTED

I. Whether a federal criminal defendant proceeding pro se in federal court may be held to a strict standard of specificity of objection to jurisdiction based on an unsworn information and be subsequently prosecuted on that basis of said information.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at ___ F.2d 1676 and is printed in Appendix A hereto, infra, page 15. The Journal Entry of Judgment of the United States District Court for the Western District of Texas, Jack Roberts, Judge, is printed in Appendix A hereto, infra, page 40.

JUDGMENT

The judgment of the United States Court of Appeals for the Fifth Circuit (Appendix A, infra, page 15) was entered on July 14, 1980. A timely petition for rehearing en banc was denied on December 8, 1980 (Appendix A, infra, page 31). The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

I. Whether a federal criminal defendant proceeding pro se in federal court may be held to a strict standard of specificity of objection to jurisdiction based on an unsworn information and be subsequently prosecuted on that basis of said information.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourth Amendment to the Constitution of the United States, which provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause supported by Oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

STATEMENT OF THE CASE

This is an appeal from a federal criminal prosecution, in which Petitioner, Alex R. Grote, Jr., was convicted of failure to file tax returns, in violations of 26 U.S.C. § 7203.

THE RULINGS BELOW

An information was filed in the case on January 5, 1979, charging defendant with failure to file income tax returns for the years 1975 and 1976 (Counts I and II), in violation of 26 U.S.C. § 7203, and supplying a fraudulent withholding exemption certificate (Count III), in violation of 26 U.S.C. § 7205. This information was unsupported by oath.

Arraignment occurred on January 19, 1979. At that time, defendant, proceeding pro se, objected to the court's jurisdiction in the cause, and said

objection was overruled. On April 9, 1979, defendant and the government announced ready and selected a jury. On April 9, 1979, trial was had. The case was argued to the jury on April 10, 1979, and on that date, the jury returned a verdict of guilty as to Counts I and II. The district court dismissed Count III on the motion of the United States Attorney on May 3, 1979, and sentenced defendant to six months imprisonment on Count I and one year imprisonment on Count II. Execution of the sentence on Count II was suspended and defendant was placed on probation for three years, to begin at the conclusion of the sentence imposed on Count I. This judgment was affirmed by the United States Court of Appeals for the Fifth Circuit on July 14, 1980. A timely petition for rehearing en banc was denied on December 8,

1980. Petitioner's sentence on Count I was reduced to three months on December 22, 1980, by the United States District Court for the Western District of Texas, Austin Division.

REASONS FOR GRANTING THE WRIT

I. Certiorari Should Be Granted To Decide Whether A Defendant Proceeding Pro Se In Federal Court May Be Held To A Strict Standard Of Specificity Of Objection To Jurisdiction Based On An Unsworn Information And Subsequently Be Prosecuted On The Basis Of Said Information.

The answer to this question may well affect the course and outcome of many criminal prosecutions in which the defendant is representing himself. To require a liberal interpretation of such defendant's motion and objections will help to ensure an effective defense by a defendant proceeding pro se. On the

other hand, to hold such persons to the strict and formal standards required of the legal profession can only serve to stifle the exercise of the right to self-representation, a right affirmed by the Constitution. U. S. Constitution amend VI; Faretta v. California, 422 U.S. 806 (1975). Strict procedural interpretations should neither hinder one's pro se defense nor discourage the exercise of this right.

Petitioner was brought before the District Court on an information unsupported by oath. This fact is uncontradicted, as is the clear rule that such an information is not a proper vehicle for a criminal prosecution.

> Upon the request of the attorney for the government, the court shall issue a warrant for each defendant named in the information, if it is supported by oath, or in the indictment.

Fed. R. Crim. P. 9(a) (prior to amend-

ment effective August 1, 1979).

The amended version of this rule, which became effective August 1, 1979 (after the trial of this cause), further delineates the requirements of an oath.

> Upon the request of the attorney for the government, the Court shall issue a warrant for each defendant named in an information supported by a showing of probable cause under oath as is required by Rule 4(a) or in an indictment.

Fed. R. Crim. P. 9(a).

The information and subsequent arrest of defendant were thus invalid, and operated to divest the district court of jurisdiction. This court has rejected the contention "that the prosecutor's decision to file an information is itself a determination of probable cause that furnishes sufficient reason to detain a defendant pending trial." Gerstein v. Pugh, 95 S.Ct. 854 (1975). In that case, the Court held that prose-

cutorial judgment standing alone does not meet the requirements of the Fourth Amendment. 95 S.Ct. at 864.

At his arraignment, petitioner, proceeding pro se, objected to the district court's jurisdiction.

> THE COURT: Come up here, please, sir. The court reporter has to get this in the record, that is why we want to get you here where we can hear you, all right.
>
> MR. GROTE: Well, I respectfully decline because this court lacks jurisdiction.
>
> THE COURT: That is overruled.

Supp. R. Vol. 1, p. 2.

By immediately and summarily overruling this objection, the trial court denied appellant the opportunity to explain the nature of his jurisdictional challenge.

On appeal, the United States Court of Appeals for the Fifth Circuit ruled that the defendant had not preserved the

error and had waived any objection to the form of the information and to the Court's jurisdiction over him. In so doing, it cited petitioner's counsel's later motions objecting to the subject matter jurisdiction of the Court, and found that "Grote's failure specifically to object to the personal jurisdiction of the Court under the faulty arrest warrant thus constitutes a waiver of that objection under Rule 12(b)(1)". United States v. Grote, ___ F.2d 1676, 1678.

Grote's objection was not clearly directed to the Court's subject matter jurisdiction, as the panel's opinion suggests. That opinion fails to note that petitioner was unrepresented by counsel at the beginning of the arraignment, when he made his objection. The motions later filed by petitioner's

counsel, and relied upon by the panel in its opinion, do not in any way refer to, encompass, or reflect the subject matter of Grote's pro se objection to personal jurisdiction.

Indeed, the thrust of that objection was ambiguous and ill-defined. As such, it falls into the ambit of Haines v. Kerner, 404 U.S. 519 (1972). In Haines, this Court declared that the post-trial motions of petitioners proceeding pro se must be accorded a lenient and liberal interpretation - that such motions may not be held to the strict formal standards required of petitioners represented by counsel. The logic of Haines dictates that the Courts should liberally construe petitioner's pro se objection to the Court's jurisdiction and resolve its ambiguity in his favor.

At first glance, such an argument

may seem precluded by this Court's dictum in Faretta v. California, 422 U.S. 806 (1975), in which the Court declared that a defendant who has intelligently and knowingly waived his right to counsel cannot thereafter complain about the quality of his defense. The two situations can be readily distinguished, however. In Faretta, the Court hypothesized a defendant who refuses counsel throughout the trial and who then complains of a lack of effective representation. In petitioner's case, however, we are discussing a time during arraignment, before counsel had been appointed and while petitioner was appearing pro se. Moreover, we are here concerned with the leniency of interpretation to be accorded to objections made by petitioners appearing pro se, not with belated complaints about the general

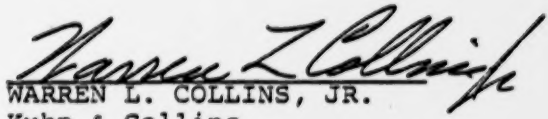
quality of one's self-defense.

In Gerstein v. Pugh, 95 S.Ct. 854 (1975), this Court held that prosecutorial judgment standing alone does not meet the requirements of the Fourth Amendment. 95 S.Ct. at 864. The waiver of one's basic Fourth Amendment rights cannot be based upon a defendant's confusion or his lack of knowledge of the specific words necessary to proffer a formal objection.

Writ of certiorari should be granted to decide whether petitioner's pro se objection to jurisdiction should have been liberally construed and his conviction overturned due to the government's reliance on an information unsupported by oath.

CONCLUSION

WHEREFORE, petitioner respectfully prays that a writ of certiorari be granted.



WARREN L. COLLINS, JR.
Kuhn & Collins
A Professional Corporation
507 West Tenth Street
Austin, Texas 78701
512/472-7241

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APPENDIX A

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,

VS.

ALEX R. GROTE, JR.,
DEFENDANT-APPELLANT

NO. 79-5279
SUMMARY CALENDER

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

JULY 14, 1980

REHEARING AND REHEARING EN BANC
DENIED DEC. 8, 1980

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS

BEFORE HILL, GARZA, AND THOMAS
A. CLARK, CIRCUIT JUDGES

THOMAS A. CLARK, Circuit Judge:

The appellant, Alex Grote, was convicted under two counts of an information charging him with violating 26 U.S.C. § 7203, in that, for the years 1975 and 1976, he failed to file income tax returns "stating specifically the

items of his gross income and any deductions and credits to which he was entitled."[1] On appeal he challenges the trial court's instructions to the jury; the exclusion of evidence offered as relevant to his specific intent; the admission of opinion testimony by an IRS agent concerning the "acceptability" to the Service of those 1040 forms filed by the appellant for the two years in question; the adequacy of his arraignment proceedings; his prosecution under an allegedly unpublicized change in agency policy; and the trial court's exercise of personal jurisdiction over him based on an arrest warrant issued pursuant to an unverified information. Finding no merit in any of appellant's contentions of error, we affirm.

The evidence at trial disclosed that during the years in question the

defendant Grote was an employee of the Hill Bookbindery in Austin, Texas. His employer's W-2 forms show that Grote received $10,000 in "wages, tips, and other compensation" in 1975, $10,323.00 in 1976. Grote did not submit his W-2's for either of those years along with his 1040's; instead his returns reported "total income" figures of $155.00 for 1975 and $554.00 for 1976. He attached to his 1975 return a letter explaining his belief, only recently arrived at, that Federal Reserve notes were not "legal money" under the Constitution, and complaining further that his privacy rights are violated by the filing requirements of the income tax laws. Grote applied for a refund of the $177.30 which was withheld by his employer in 1975. No withholdings were made in 1976, presumably the result of a with-

holding exemption certificate, purportedly filed by Grote in January of that year, in which he stated that he expected to incur no income tax liability in 1976.

[1] The first of Grote's enumerations of error, in the order in which they are said to have occurred, concerns the trial court's jurisdiction over his person. It is undisputed that the defendant's presence at his arraignment proceedings was secured by an arrest warrant issued pursuant to an unverified information. Fed. R. Crim. P. 9(a) provides for the issuance of an arrest warrant for a defendant named in an information, but only "if it is supported by oath . . ." The procedure for raising objections to the personal jurisdiction of the court, however, is governed by Fed. R. Crim. P. 12.

> Rule 12(b)(1) of the Rules of Criminal Procedure requires that objections based on the institution of the prosecution be raised prior to trial, and the failure to adhere to the requirements of that Rule results in a waiver of the objection. Unlike the objections to the subject matter jurisdiction of the court which cannot be waived under Rule 12(b)(1) . . . objections to personal jurisdiction over a particular defendant can be.

United States v. Kahl, 583 F.2d 1351, 1356 (5th Cir. 1978) (citation omitted). Grote contends that his objection to the court's jurisdiction at arraignment preserves the issue of the defective warrant on appeal.[2] As the motions which were filed by Grote's counsel

after arraignment and before trial make clear, however, defendant's objection was to the subject matter jurisdiction of the trial court. R., pp. 22, 44-51. At no time was the trial court's attention ever called to the defective warrant. Grote's failure specifically to object to the personal jurisdiction of the court under the faulty arrest warrant thus constitutes a waiver of that objection under Rule 12(b)(1).

[2, 3] Grote next complains of the conduct of the arraignment proceedings. The record discloses that the trial court failed specifically to read the indictment, to read the contents of the information to the defendant or to state to him the substance of the charge.[3] But the record also reveals that, subsequent to the appointment of counsel to represent Grote, a recess in

the arraignment proceedings was held in order for counsel to consult with Grote concerning the charges against him.[4] "Vacating convictions for lack of formal arraignment proceedings is predicated on the existence of possible prejudice." United States v. Rogers, 469 F.2d 1317, 1317-18 (5th Cir. 1972). We do not believe that any prejudice has resulted from the failure of the trial judge personally to inform the defendant of the charges against him. The trial judge assigned that responsibility to appointed counsel, and he satisfied himself that that responsibility had been discharged before calling upon the defendant to plead.

[4] The appellant next complains of two evidentiary rulings made by the court in the course of trial. The first of these concerns the testimony of David

Clore of the IRS. In its effort to prove knowledge on the part of the defendant in failing to make the required disclosures of income in his 1975 and 1976 returns, the Government sought testimony from Clore concerning the contents of Grote's returns for the three years prior to 1975. Throughout this line of inquiry Clore was allowed, over objection, to contrast the evidence of these returns with those of 1975 and 1976 in terms of the "acceptability" of each return to the Service for purposes of computing a tax.[5]

[5] Grote objects to the use of the word "acceptable" as suggesting to the jury that it should defer to the opinion of the IRS on the question of his guilt. This argument is without merit. As the Government's counsel made clear by successive questions, the

purpose of this inquiry was to contrast the contents of those returns which were in fact accepted by the Service with those which were not, in order to show prior knowledge on Grote's part of what was required of him. Clore's qualifications as a witness were as Chief of the Criminal Investigation Staff at the Austin, Texas, Service Center with access to the documents themselves. Trans., Vol. 2, pp. 46-48. As such, his testimony in the form of an opinion concerning the acceptability to the Service of the returns in question is admissible under F.R.E. 701 so long as it is "limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." The "facts[s] in

issue" were the contents of the returns and the inferences that the jury might draw therefrom. It might have been possible for the Government to highlight this contrast without having Clore express an opinion as to the acceptability of any of these returns. But "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." F.R.E. 704. We conclude that it was not an abuse of discretion to admit this testimony.

[6] Appellant also objects to the exclusion from evidence of a court opinion which purportedly held that returns substantially similar to Grote's had been accepted by the court and the Government in that prior action. Unfortunately, the record fails to disclose

the citation of this authority, so we have no occasion to assess its relevance to Grote's argument that he relied thereon in filing his own returns. This does not foreclose us from ruling on this objection, however, for it appears from the record that Grote's argument was fully developed before the jury. David Martin, the "tax consultant" whose advise is no doubt partly responsible for the trouble Grote finds himself in, was called, recalled, and recalled again, to testify to the defendant's version of this missing judgment. "With the essence of desired evidence before the jury, any harm in the . . . exclusion [of the documentary evidence] was eliminated." United States v. Sanfilippo, 581 F.2d 1152, 1155 (5th Cir. 1978). See also United States v. Ashley, 555 F.2d 462, 465 (5th Cir. 1977). Since we

are unable to conclude that "a substantial right of the [appellant] is affected," F.R.E. 103(a), we find no abuse of discretion in the exclusion of this opinion.

[7] When both sides closed, Grote moved the court for a judgment of acquittal. His motion was denied. He contends that it had been the policy of the Government not to prosecute protest tax returns of his variety before 1975, and that his prosecution marked a departure from that alleged policy without the benefit of notice and comment rulemaking. The sole support for the existence of this policy is the cross-examination testimony of Clore that such returns "may have been" accepted before 1975.[6] In short, Grote contends that similar transgressors in the past have not been prosecuted.

> Mindful of the separation-of-powers implications-permeating this entire area, [this court has held] that in order to make a claim of selective prosecution, the defendant must show: (1) that others similarly situated have not been prosecuted, and (2) that the Government's prosecution of him is selective, invidious, in bad faith or based on impermissible considerations such as race, religion, or his exercise of constitutional rights.

United States v. Hayes, 589 F.2d 811, 819 (5th Cir. 1979) (footnote omitted); U. S. v. Kahl, supra, at 1353. Grote alleges no more than that he has been "caught in the net of increased awareness and sensitivity to particular classes of crimes," Hayes, supra, at 818. Alone this fails to support a

motion for acquittal.

[8] Grote's last objection, in point of time, concerns the trial court's charge to the jury. In the course of its charge the court instructed the jury as follows:

> There are three essential elements which the Government must prove beyond a reasonable doubt in order to establish the offense or failure to file a return as charged in Count One and Count Two of the information.
>
> First, the defendant was required by law or regulation to make a return of his income for the taxable year charged.
>
> Secondly, that the defendant failed to make such a return at the time required by law, and
>
> Third, that the defendant's failure

> to make the return was willful. You are further instructed that a taxpayer's return which does not contain financial information enabling the Internal Revenue Service to determine the party's tax liability, if any, is not a return within the meaning of the Internal Revenue Code or the regulation adopted by the Commission of Internal Revenue Service.[7]

The correct standard of review to be applied to challenges to jury instructions is whether the court's charge as a whole was a correct statement of law. United States v. Arguelles, 594 F.2d 109, at 112, n. 3 (5th Cir. 1979). See also United States v. Chandler, 586 F.2d 593 (5th Cir. 1978); United States v. Sanfilippo, 581 F.2d 1152 (5th Cir. 1978).

[9] Appellant does not object to the first part of the excerpted charge, which we agree accurately sets forth the elements of the crime charged in the information. He argues instead that the "you are further instructed" part of the charge had the effect of directing the jury to find the second element of the offense set forth immediately before, namely, "that the defendant failed to make such a return . . ." We cannot agree. This language merely instructed the jury, in light of the evidence that had been introduced at trial, how it might find the existence of the second element of the offense charged, and was an accurate statement of the law. See United States v. Wade, 585 F.2d 573, 575 (5th Cir. 1978); United States v. Johnson, 577 F.2d 1304, 1311 (5th Cir. 1978). The responsibility to find the

second element of the offense was clearly the jury's under the charge as given.

For the reasons stated above, the judgment is AFFIRMED.

ON PETITION FOR REHEARING
AND PETITION FOR REHEARING EN BANC

Before HILL, GARZA, and THOMAS A. CLARK, Circuit Judges.

PER CURIAM:

The defendant on petition for rehearing strongly urged that in our original opinion we overlooked the defendant's contention that the Internal Revenue Service had violated the notice and comment provisions of the Administrative Procedure Act, 5 U.S.C. § 552(a)(I)(D) and (E).[1] Defendant contends that the Internal Revenue Service had previously determined not to prosecute cases such as his, and had changed this policy without complying with the statute.

Defendant relies on the following testimony from David Clore, Chief of Criminal Investigation Staff at the Internal Revenue Service South Center:

Q Okay. Have you ever seen a tax return like this before? [Petitioner's 1975 and 1976 income tax returns]

A Many of them.

Q Okay. Has the Internal Revenue Service ever accepted this particular tax return?

A Based upon my knowledge, I think prior to our procedure at that time, there may have been returns filed that were accepted by the Internal Revenue Service.

Q So, these in particular - This type of return has before been accepted by the Internal

Revenue?

A That's correct . . .

Q (By Mr. Collins) What is the date that the Internal Revenue - I'm assuming that that is correct, quit accepting this particular type of return?

A In 1974.

Q In 1974. And it is your - Your answer to that question is since 1974 they will not accept [this] type of return; is that correct?

A That is correct.

Defendant also points to the testimony of David Martin who stated that such tax returns had been accepted by the Service prior to appellant's filings to show that the Government had determined not to prosecute cases such as this.

Such evidence is not enough. It

does not relate to criminal prosecutions. The defendant has directed us to no previously existing policy of either the Internal Revenue Service of the Justice Department indicating that there was an established practice or policy not to prosecute persons who filed returns similar to those filed by the defendant in this case.

Our original opinion disposed of any contention of the defendant that he might have been selectively prosecuted. His claim that the Internal Revenue Service changed a substantive rule of general applicability without having offered any evidence of the existence of such a rule approaches the frivolous.

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be

polled on rehearing en banc (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

FOOTNOTES:

1. Record, p. 1.

2. Trans., Vol. 1, p. 2:

"MR. GROTE: Well, I respectfully decline, because this court lacks jurisdiction."

At p. 5:

"MR. COLLINS: At this time, Your Honor, I would ask that the Court enter a plea of Not Guilty for Mr. Grote. Mr. Grote has come disagreement about what has been filed against him and the jurisdiction of the Court in this case. I would ask the Court to enter a plea of Not Guilty for him and set it for trial."

3. "Arraignment shall be conducted in

open court and shall consist of reading the indictment or information to the defendant or stating to him the substance of the charge and calling on him to plead thereto. He shall be given a copy of the indictment or information before he is called upon to plead." Fed. R. Crim. P. 10.

4. Trans., Vol. 1, pp. 3-6.

5. Trans., Vol. 2, at p. 49:

"Q: Now, would you look at the return itself? Was it an acceptable return in the eyes of the Internal Revenue Service during 1972?

A: Yes, Sir.

MR. COLLINS: Your Honor, I object to the terminology of acceptable. That's yet to be determined by the Court under the law."

At p. 51:

"Q: And is that [Grote's 1973

return] a proper filing of an Internal Revenue requirement form allowing you to be able to adequately compute whether a tax would be owing or not?

A: It is.

Q: Is that an acceptable Internal Revenue form for that reason?

A: It is acceptable.

MR. COLLINS: I object to the same word, Your Honor. The use of acceptable."

At p. 58:

"Q: All right. Now, what does that mean?

A: That means Mr. Grote did not file a tax return for the calendar year 1975.

Q: All right. Does that mean an acceptable tax return that would allow you to -

MR. COLLINS: Your Honor, I'm

going to object to that terminology again, with regard to whether or not they will accept a tax return."

At p. 60:

"A: It shows that - There is no return has [sic] posted to Mr. Grote's master file account.

Q: Does that mean a return acceptable under the law by the Internal Revenue Service which would allow the Internal Revenue Service to compute whether or not he owed taxes for the year, calendar year 1976?

A: Such return has not been filed.

A: Now, Mr. Clore, as a matter of fact, were papers filed by Mr. Grote during the calendar years 1975 and 1976 with the Internal Revenue Service?

A: Certain documents were.

Q: All right. Were you able,

based on those documents, to be able to compute whether or not a tax was owing, as required by law, by Mr. Grote for the years 1975 or 1976?

A: No, Sir."

6. Trans., Vol. 2, p. 63.

7. Trans., Vol. 2, pp. 127-28.

1. The statute reads as follows:

(a) . . .

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public -

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

To substantially the same effect is 26 C.F.R. § 601.702(a)(iv) and (v).

JUDGMENT OF DISTRICT COURT

Defendant, Alex R. Grote, Jr., in the presence of the attorney for the government, appeared in person and by his attorney, Rip Collins, on May 4, 1979. Defendant has been convicted as charged for the offense of wilfully and knowingly failing to make income tax returns, in violation of Title 26, United States Code, Section 7203, as charged in counts 1 and 2. The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is

hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of six (6) months on count 1 and one (1) year on count 2. Execution of the sentence of imprisonment imposed herein on count 2 is hereby suspended and the defendant placed on probation for a period of three (3) years, pursuant to Title 18, United States Code, Section 3651 and the Amended General Conditions of Probation Adopted by the Judges of the Western District of Texas on December 26, 1973, to begin at the conclusion of the sentence imposed herein on count 1. It is the Further Order of the Court that the defendant pay a fine to the United States of America in the amount of one thousand ($1,000.00) dollars. Upon motion of the United States Attorney, duly made in

open court, Count 3 of the information is hereby dismissed.

/S/ JACK ROBERTS

PROOF OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Petition For Writ Of Certiorari has been sent certified mail, return receipt requested, to Mr. Wade Hampton McCree, Jr., Solicitor General of the United States, United States Department of Justice, Washington, D.C., 20530, on this the 6th day of February, 1981.

Warren L. Collins

WARREN L. COLLINS, JR.

Office-Supreme Court, U.S.
FILED
JUN 3 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1622

In the Supreme Court of the United States

OCTOBER TERM, 1980

ALEX R. GROTE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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ALEX R. GROTE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that his conviction for failing to file income tax returns should be overturned on the ground that the trial court's jurisdiction over his person rested on a warrant issued pursuant to an unsworn information, in violation of Fed. R. Crim. P. 9(a).

The pertinent facts may be summarized as follows. On January 5, 1979, the United States Attorney for the Western District of Texas filed an unsworn information charging petitioner with failing to file income tax returns for the years 1975 and 1976, in violation of 26 U.S.C. 7203 (1 R. 1; Pet. App. 18). Petitioner was arraigned on January 19, 1979, before the United States District Court for the Western District of Texas. At the outset of the arraignment, petitioner, appearing without counsel, objected that the

court lacked jurisdiction (III R. 2). The court overruled the objection, appointed counsel, and ordered a recess so that petitioner could discuss the charges against him with counsel (III R. 2-4).

Following the recess, counsel advised the court that petitioner "has some disagreement about * * * the jurisdiction of the Court in this case" and accordingly requested that a plea of not guilty be entered (III R. 5). Petitioner added that he wished to "enter a plea of lack of jurisdiction" (III R. 6). The court then invited petitioner to file a written challenge to its jurisdiction and entered a plea of not guilty (*ibid.*). Subsequently, counsel filed two motions to dismiss for lack of jurisdiction, one before trial and one on the day of trial (I R. 10, 22). Neither motion questioned the court's jurisdiction over petitioner's person; rather, each objected to the court's subject-matter jurisdiction (Pet. App. 19-20).[1]

Petitioner was tried and convicted by a jury on April 9-10, 1979. On August 31, 1979, petitioner filed in the district court a motion to set aside the verdict, and on September 24, 1979, filed a petition for a writ of habeas corpus. These pleadings set forth, for the first time, petitioner's objection to the court's personal jurisdiction on the ground that the warrant that brought him before the court rested on a defective information. The motions were denied on September 11 and November 1, 1979, respectively, because petitioner's appeal to the Fifth Circuit (filed on May 11, 1979) had removed the district court's jurisdiction.

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[1]The first motion asserted that the court lacked jurisdiction because an unrelated suit had been dismissed. The second contended that "[t]he Court, under the rules of 'Criminal Procedure,' lacks jurisdiction to hear civil law in a criminal action" (I R. 22). In addition, petitioner moved to quash the complaint and information on the ground that the prosecution should have been initiated by presentment to a grand jury.

On appeal, the Fifth Circuit held that petitioner had waived his objection to personal jurisdiction because neither he nor his counsel specifically objected on this ground or called the court's attention to the defective warrant (Pet. App. 19-20).

1. The court of appeals correctly concluded that petitioner waived his right to object to the court's jurisdiction over his person. Fed. R. Crim. P. 12(b)(1) requires a defendant to raise "[d]efenses and objections based on defects in the institution of the prosecution" prior to trial. *United States* v. *Kahl*, 583 F. 2d 1351, 1356 (5th Cir. 1978). Neither petitioner nor his counsel, despite repeated opportunities to do so, complained of the defective warrant until after trial and sentencing.[2]

Petitioner nevertheless cites *Faretta* v. *California*, 422 U.S. 806 (1975), and *Haines* v. *Kerner*, 404 U.S. 519 (1972), for the proposition that his general objection to the court's jurisdiction, voiced at the arraignment and before counsel was appointed, should be liberally and broadly interpreted as preserving his objection to personal jurisdiction because he was, at that point, appearing *pro se* (Pet. 11-12). This argument fails for two reasons. First, a defendant who chooses to represent himself must abide by the consequences of his decision, including his possible ignorance of procedural or substantive technicalities. *Faretta* v. *California*, *supra*, 422 U.S. at 835; *United States* v. *Anderson*, 577 F. 2d 258, 261 (5th Cir. 1978); *United States* v. *Blackwood*, 582 F. 2d 1244, 1246 (10th Cir. 1978). Second, petitioner in fact was represented by counsel throughout virtually the entire pretrial period, and certainly in time to raise the personal jurisdiction objection with the necessary specificity and timeliness.

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[2]See note 1, *supra*, and accompanying text.

2. At all events, the relief petitioner seeks is unwarranted. Even assuming, *arguendo*, that petitioner preserved his objection to personal jurisdiction because of the concededly defective information and warrant issued pursuant thereto, his conviction supplied whatever indicia of probable cause may have been lacking in the warrant. Accordingly, as this Court has often held, the conviction is valid even if the arrest was not. *United States* v. *Crews*, 445 U.S. 463, 474 (1980); *Gerstein* v. *Pugh*, 420 U.S. 103, 119 (1975); *Frisbie* v. *Collins*, 342 U.S. 519, 522 (1952). At most, therefore, petitioner's claim is that he was illegally arrested because the warrant was issued in violation of Rule 9(a). Since no evidence resulting from this arrest was introduced against him at trial, he would be entitled to no relief even if he had not waived his objection.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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